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No. 1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

TRUMBULL ASPHALT COMPANY OF DELAWARE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Trumbull Asphalt Company of Delaware, prays that a writ of certiorari issue to review the decision and decree of the United States States Court of Appeals for the Seventh Circuit, entered on March 26, 1963, enforcing an unfair labor practice order issued by the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court below is printed as Appendix A hereto. The Decision and Order of the Board appear at Pages 40 through 143 of the printed Appendix furnished by Petitioner for the use of the court below (hereinafter called "App.") of which nine copies are filed herewith.

JURISDICTION

The decision and order of the court below and its decree were entered on March 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. 160(e)), hereinafter called the Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board has, by an improper and irresponsible Report, as ordered enforced by the Seventh Circuit, deprived Petitioner of its statutory right to an effective appeal of its decision to the courts.

2. Whether this Report deprives Petitioner of its right to due process of law.

3. Whether the Board's Report failed to make proper findings of fact as required by the Administrative Review Act.

4. Whether the Board's Report should have been reversed by the Seventh Circuit because it revealed on its fact the hostility of the Board and the Trial Examiner toward Petitioner.

5. Whether the Seventh Circuit erred in not reversing the Board's Report because it was not supported by substantial evidence on the Record considered as a whole.

STATEMENT

This was a consolidated complaint brought by the Board, and charging Petitioner with violations of Sections 8(a)(1) and (3) and Section 8(a)(5) of the Labor Management Relations Act. The original charging party, Warehouse & Mail Order Employees Union, Local 743, requested the withdrawal of the charges prior to the hearing. This request was allowed as to the Section 8(a)(5) charges, but denied as to the Section 8(a)(1) and (3) allegations (App. 39). The Union took no further part in the proceedings.

A hearing was held at Chicago, Illinois, before Trial Examiner William Seagle, who issued his Intermediate Report on December 15, 1961, finding that the Petitioner had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, including restoring certain employees to their former jobs (App. 137). This Report was adopted by the Board in its Decision and Order of April 25, 1962. Petitioner appealed to the Seventh Circuit which affirmed the Order of the Board and ordered it enforced.

Petitioner is engaged in the processing and sale of asphalt products. Although it has plants in other parts of the country, the events with which this charge is concerned occurred at its plant in Summit, Illinois, a suburb Southwest of Chicago.

A key question is whether or not certain employees (John Pounovich, William J. Bonow, George Boehme, Leo Kregul, Carlos McCurdy and Samuel W. Whitter, are "supervisors" within the meaning of the Act. The Board

has found that they are (App. 46 *et seq.*). Petitioner contends that they are mere lead employees and do not have the authority required by the Act.

The Complaint charged that on October 20, 1960, Petitioner discriminatorily terminated the employment of eight of its employees. The Board upheld this allegation (App. 84 *et seq.*). Petitioner contends that lay-offs were required by a drastic decrease in orders in the paint shop; that four of the men were temporarily laid off for this reason, and that the other four quit voluntarily when they learned of the prospective lay-offs.

The Board found (App. 101 *et seq.*) that two employees, James Harris and Will Steele, were driven to resign by Petitioner. Petitioner contends that they refused to obey reasonable work orders.

The complaint charged that on January 9, 1951, the Petitioner terminated the employment of seven of its employees because of their support of the union; the Board agreed (App. 106 *et seq.*). Petitioner contends that the lay-offs were required by a seasonal decline in the asphalt business.

The Board has found that two employees were wrongfully discharged on February 8, 1961, because of their support of the union (App. 117 *et seq.*). Petitioner contends that they were discharged for sleeping on the job.

All of the above findings of the Board have been approved by the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

THE NATIONAL LABOR RELATIONS BOARD HAS, BY AN IMPROPER AND IRRESPONSIBLE REPORT, DEPRIVED PETITIONER OF ITS STATUTORY RIGHT TO AN EFFECTIVE APPEAL OF ITS DECISION TO THE COURTS. THE SEVENTH CIRCUIT FAILED TO CORRECT THE ERROR AND IGNORED THE ISSUE.

This Petition asks that this Court consider the effect of a Report of the National Labor Relations Board on the statutory and Constitutional rights of the Petitioner. It presents the question of whether federal administrative agencies are to be allowed to short-circuit court review of their findings of fact by couching those "findings" in terms which make effective review of them impossible. This the Board has done in this case by a Report which is not only general and ambiguous, but goes far beyond that and includes subjective descriptions, speculation about matters entirely outside the record, sarcastic comments on the personalities of witnesses, and other material which in a trial court would be regarded as prejudicial and inflammatory. This has the double effect of depriving Petitioner of the power to disprove the "findings", and of prejudicing the mind of any reader of the Report, including particularly a reviewing court.

This Court has criticized "general and ambiguous statements" of administrative agencies which are "intended to serve as findings" (*Atchison Ry.* v. *United States*, 295 U.S. 193, 291), and has made it clear that the agencies should not "shelter behind critical generalities of such looseness

of expression" that the court is unable to effectively review their orders" (*Automatic Canteen Company* v. *Federal Trade Commission*, 346 U.S. 61, 81). It has not, however, considered the effect on the rights of an agency's use of highly prejudicial and inflammatory speculations and gratuitous comments entirely outside the record. This is a question on which a ruling by this Court would be of national importance.

In writing its so-called "findings of fact", the Board here used the "narrative" style which has become increasing popular with federal administrative agencies. Whether or not that style is objectionable *per se*, it is plain that it is getting out of hand. This Report with which Petitioner is faced is one of thousands which resemble it. According to the 26th Annual Report of the National Labor Relations Board, that Agency issued decisions in 3,254 contested matters during the fiscal year ended June 30, 1961 (Report, Page 17). If we add to that figure the decisions of the Federal Trade Commission, the Interstate Commerce Commission, and the multitude of other federal agencies, the total number of decisions rendered must have been staggering.

Many of these rulings involve (as here) findings on disputed issues of fact—a function for which the agencies were not originally intended and are not ideally suited. In view of the increasing number and importance of such findings, public confidence in the federal government requires that findings of fact be made in a responsible manner and that careful review by the courts is possible.

It has long been recognized by this Court that in the absence of clear, concise, and comprehensible findings by an administrative agency, a reviewing court is unable to

exercise its function (*Panama Refining Company* v. *Ryan*, 293 U.S. 388, 432). If a reviewing court is "halted at the threshold" by "vague findings, then statutory rights will be whittled away". (*United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489). It follows that "an order cannot be sustained unless supported by *essential basic facts particularly stated*". (*Boston & Maine R.R.* v. *United States*, 202 F. Supp. 830, 834 (D. Mass. 1962) Jud. affirmed, 9 L. Ed. 95 (1962).)

In the present case, the Board has not only committed the error condemned in the cases cited above, but has gone a step further and has added descriptive and inflammatory material entirely outside the record which cannot be disproved by citation to the record. The reviewing court is thus halted at the threshold not only by ambiguities and generalities, but by a miasma of prejudice and confusion. It has been deprived of its power to make an effective review, and Petitioner has been deprived of its statutory right to such a review.

The importance of that statutory right to appeal cannot be overstated. In cases of this type, a Trial Examiner (in the past associated with the agency presenting the case) rather than a Judge, conducts the hearings and is the only official to see and hear the witnesses. The Federal Judiciary has been entrusted by Congress with the responsibility for making certain that these agencies do not abuse the power given to them.

The extent of that power is apparent when we consider that in many cases (as here) the factual determination of the agency is conclusive unless supported by substantial evidence in the record considered as a whole (Title 29 U.S.C. 160(f)). In such a case, effective review by the courts is doubly important. Congress has given litigants

the right to appeal, and at the same time has imposed a handicap upon them. They can take advantage of their right only if they are able to demonstrate the lack of substantial evidence.

By its Report in this case, the Board has made such a demonstration by Petitioner virtually impossible. It has presented as "findings of fact" a hundred pages (App. Pages 39-134) of narrative material which would be more appropriate in a novel. We shall give below examples of the generalities, speculations, descriptions, innuendo and invective to which an effective answer is impossible.

The Board's production is divided into sections with appropriate headings. There could be no objection to some such orderly method of presentation, except that the Board used the device of making statements in an early section and promising support for them in a later chapter —in such a way that it became impossible to tell where the supposed support might be.

For example, under the headings *"Scienter"* (designed to show the employer's knowledge of union activity), the statement is made that: "There is a vast amount of affirmative evidence that the respondent's supervisory employees knew of the union affiliation of particular employees against whom they practiced discrimination. This evidence will be set forth, however, in connection with the discussion of the cases of these employees, and also where it is otherwise relevant." (App. 57)

What are we to do about this statement? Could not the Board at least in a footnote have mentioned the employees in connection with whom it expects to discuss this "vast amount" of evidence? It does have discussions on this point sprinkled through the report. But to call it a

"vast amount" of evidence is an unfair designation since it cannot be combated.

Also in the section on "Scienter" is a typical discussion aimed at showing that union buttons were worn and must have come to the attention of the employers' supervisors. The Board says that:

> "The record shows, affirmatively, that at least 17 of the Summit plant employees wore their buttons openly in the plant at all times; and these included all the discriminatees who are included in the complaint, and who testified at the hearing, except Edison Jones, Sr., Allen Davis, and Edmund Dykier" (App. 55).

This vividly illustrates the unfairness of the Board's technique. *Which* seventeen employees is it talking about? What does it mean by the statement that they "wore their union buttons openly in the plant at all times?" This was, of course, a key "finding" and we were compelled to try to find which seventeen employees the Board had in mind, and to see what the testimony was. Our painstaking search of the transcript revealed that the testimony was only that the buttons had been worn "on the premises" of the company.[1] Since Government counsel refrained from asking where on the premises, the buttons might have been worn in the men's washroom. Only *five* employees testified that they wore their buttons openly during working hours.[2]

The next chapter in the Report is called "Credibility", and finds the General Counsel's witnesses *unitormly* and completely credible (there were 27 of them), partly for the remarkable reason that their "very limitations . . .

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[1] App. 164; 227; 316; 326; 366; 464; 467; 474; 517.

[2] App. 287; 471; 477; 496.

are in themselves guarantees of their veracity" (App. 59). In this section also the Board repeats the device discussed above, with the flat though undocumented statement that "The record is replete with instances of antiunion remarks or threats being made not only to single employees but also to two or more employees at the same time, or while one or more other employees were present." (App. 58). Again, there is no clue to what conversations go to make the Record "replete".

There are several patent objections to a "finding" of this nature: First, we have no way of combating it because we do not know what the Board means by "replete" —how many instances would meet such a description? Second, we have no enlightenment as to what instances, involving what witnesses, the Board has in mind. Our painstaking analysis of the testimony demonstrated that most of the conversations were alleged to have occurred with only two persons present. Third, and just as important, the Board has, by a positive statement, conditioned the reader (including particularly the reviewing court) to think that there are in fact many instances.

The prejudicial effect of the descriptive matter included in the Report is illustrated by the gratuitous references to the witnesses. In this connection, the General Counsel's witnesses are uniformly described in the most sympathetic terms, while those of the Petitioner are treated with sarcasm and innuendo.

For example, one of the key questions was whether one Dykier had been discharged for sleeping on the job. The Report describes the incident in the following condolatory manner: "He sat around for awhile, as he always did, thinking of his troubles: there had been illness in his family, apparently, and it had caused him to postpone his

vacation. The shipping room was hot, and soon he began getting a bad headache." (App. 118). Warming to another Government witness, the Report complimented him: "Kubiak who was extremely self-possessed, and never lost his aplomb even under the most trying circumstances . . ." (App. 61).

Generalizing about these witnesses, the Board felt that: "Moreover, the very limitations of the General Counsel's witnesses are in themselves guarantees of their veracity. They simply did not possess the genius for invention, which it would have been necessary to presuppose to discredit their testimony." (App. 59). Along this line, it proceeded to rescue one of them by stating that his testimony was utterly impossible and therefore must (by some process of alchemy) be true:

> (Discussing the testimony of witness Proctor as to a conversation which he supposedly overheard in mid-October). "In a sworn statement which Proctor gave to a Board agent, he deposed that he 'thought' that the conversation between Miller and Jandak overheard by him occurred 'early in January'. This dating is, obviously, *so ludicrous and nonsensical*—a conversation about an intended layoff in October could hardly have taken place in January—that it is even difficult to understand how the reference to January could have escaped attention at the time the statement was prepared. But, since the statement embodied an impossibility, it could hardly have been intended to deceive." (App. 13).

In contrast to these helpful and forbearing comments, the witnesses for the Petitioner are depicted in the most scornful terms. A very subtle innuendo is slipped in with regard to Mr. Knoll, the Operations Manager of Petitioner: he is described as a "soft-spoken, self-possessed, and,

seemingly, affable individual" (App. 44). (How easy to imply the "smiles and smiles and is a villain still" idea!) However, the Report really lets itself go when describing James Miller, the Manager. It begins with the implication that there was something sinister in his not having attended all the sessions of the hearing: "Unlike J. A. Miller, Knoll was present at all times during the hearings * * *" (App. 44).

Having warmed up with this innuendo, the Board really goes to town on James Miller:

> "Even allowing for the possession of demoniac energy on the part of Jim Miller, notwithstanding his threescore years and ten * * *" (App. 52).
>
> "Although Jim Miller pretended not to be able to remember * * *" (App. 78).
>
> "In this great emergency, of whom should Jim Miller inevitably think but John Pounovich? * * * There followed a breathless ride through suburban Illinois in the dark of night that probably has no parallel in industrial history." (App. 120)

Departing from Jim Miller and including all the supposed supervisory employees in one comment, the Board remarked that "The respondent's supervisory employees seem to have combined the stick with the carrot approach" (App. 66). Apparently the Board is fond of this sentence, and it is unanswerable on the record. But as Judge Wisdom of the Fifth Circuit recently observed: "It is impressive logomachy to turn 'allurements' into 'coercion' by divining a secret purpose. It is good, homey, country-lawyer advocacy to argue that a carrot on a stick may have the same effect on a donkey as a club. This is beguiling rewording. But a carrot is not a club. Labor is

not a donkey. Persuasion is not coercion". (*N. L. R. B.* v. *Exchange Parts Co.*, 304 F.2d 368).

These and many other inflammatory comments of like tenor are of course entirely outside the Record, and accordingly cannot be answered from the Record. Their presence has deprived Petitioner of its statutory right to an effective review by the courts of the Board's order and Report.

If the Board intended this result, it has been successful. The Seventh Circuit was faced with a record of 945 printed pages, and a Report the nature of which we have here described. It gave quick and brief approval to the Report, ignoring the issues we raise here and raised below. The General Counsel made no attempt to defend the defects we have specified here. Instead, he proceeded in his Brief to try to document and tone down the Board's Report. That effort came too late. As this Court said in *Burlington Truck Lines, Inc.* v. *United States* 83 S.Ct. 239: "The courts may not accept appellate counsels' *post hoc* rationalizations for agency action • • •. *For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review.*"

This responsibility to the orderly functioning of the judicial process on the part of administrative agencies was recently recognized by the Federal Trade Commission in its decision in *Colgate-Palmolive Company* (Docket 7735; Feb. 18, 1963). After a previous decision was remanded to it by the First Circuit, the Commission cried *mea culpa*:

> "The appellate proceedings in this case demonstrate once again the imperative need for explicitness in administrative adjudication. An agency whose actions

are subject to appellate review must always be mindful of its duty to the reviewing court to express clearly both the rationale and the bounds of its decision. As Mr. Justice Cardozo put it, the court 'must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States* v. *Chicago, M., St. P. & P. R.*, 294 U.S. 499, 511 (1935); and see *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

"Reexamined in the light of the opinion of the Court of Appeals, the Commission's previous opinion and order in this case—appear to have been wanting in the necessary clarity."

II.

THE BOARD'S ORDER AND REPORT BY ITS FORM DEPRIVES PETITIONER OF ITS RIGHT TO DUE PROCESS OF LAW, AND THE SEVENTH CIRCUIT ERRED IN ENFORCING IT.

We have pointed out above that the Board's Report is defective and has deprived Petitioner of its statutory right to court review in two principal ways: It is a series of sweeping generalities impossible to combat; and it is heavy with speculation and innuendo. We here contend that these same defects have deprived Petitioner of its constitutional right to due process of law.

This Court warned in 1959 that "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process". (*Hannah* v. *Larche*, 363 U.S. 420, 442.) Specifically, the Constitutional requirement of the Fifth Amendment that no person shall be "deprived of life, liberty or property without due process of law" applies to the quasi-judicial proceedings of administrative tribunals (*Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 140).

"The right to an opportunity to defend the charge with which one is faced is essential to procedural due process. This stems from the right to a fair hearing, which includes a "reasonable opportunity to know the claims of the opposing party, and to meet them." (*Morgan* v. *United States*, 304 U.S. 1, 18).

In the present case the charges are in the form of conclusions reached by the Board, which Petitioner must answer in the courts. The validity of these conclusions depends upon whether or not they are supported by substantial evidence in the record, and therefore the only way to meet them is to show that they are not so supported. As we have shown above, the Board's order here is so drawn that it is impossible to determine on what evidence the Board's conclusions rest, and therefore impossible to show that they are not legal.

Here, the Petitioner has had no opportunity to show that the Board's charges are untrue because the grounds upon which they rest have been obscured by the Board. Petitioner has thus been deprived of its right to due process of law.

III.

THE BOARD'S REPORT AND ORDER FAILED TO MAKE PROPER FINDINGS OF FACT AS REQUIRED BY THE ADMINISTRATIVE REVIEW ACT, AND THE SEVENTH CIRCUIT ERRED IN ENFORCING IT.

The Administrative Review Act requires administrative agencies to make "findings and conclusions" of "all material issues of fact" (Title 4 U.S.C. Sec. 1007). Failure to make such findings requires a reversal (*Florida* v. *United States*, 282 U.S. 194, 212).

Certainly we are not complaining here about a lack of findings of fact. On the contrary, we have been swamped

with "findings". We submit that this is, if anything, worse than no findings.

For all of the reasons stated above, the "findings" in this instance were not acceptable under the requirements of the Administrative Review Act.

IV.

THE BOARD'S ORDER, WHICH ADOPTED THE REPORT OF THE TRIAL EXAMINER, REVEALS ON ITS FACE THE HOSTILITY OF THE EXAMINER TOWARD PETITIONER. THIS HOSTILITY DEPRIVED PETITIONER OF ITS RIGHT TO DUE PROCESS OF LAW. THE SEVENTH CIRCUIT ERRED IN ENFORCING THE ORDER.

We have listed in Point I above some of the malevolent language of the Trial Examiner which nakedly reveals the extent of his hostility toward Petitioner. Those descriptions in themselves demonstrate the bias and vindictiveness which he did not even try to conceal.

The most dramatic exhibition of the examiner's hostility was his finding (which the Board found it necessary to correct (App. 39)) that the General Counsel's witnesses were segregated at the hearing, and they did not, therefore, hear each other's testimony (App. 59). The Board's correction of this blatant error cannot erase the irresponsibility and disregard for fact of the person who made it in the first place. The fact is that General Counsel's witnesses sat by the hour listening to one another, positively enthralled. It is impossible that the examiner could have forgotten the scene, which was a remarkable one.

The trial examiner must have remembered that the General Counsel's witnesses were in fact not segregated. And yet he used his statement that they were segregated to

support his finding that they were credible witnesses (App. 59). This reliance upon a non-existent circumstance for a crucial finding discredits his entire Report and demonstrates his hostility toward Petitioner.

The trial examiner was not able to restrain his feelings when it came to the written word, and they have seeped into the Report adopted by the Board. A hearing conducted by a biased or prejudiced officer of an administrative tribunal is a denial of constitutional due process of law, and nullifies the proceedings before the agency. This rule is supported by the many cases cited in *National Labor Relations Board* v. *Phelps*, 136 F. 2d 562, 563 and well described in the following quotation from that case:

> "• • • for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceedings by an administrative functionary as when it is done by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceedings.* Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand."

In the case just cited, recourse was had to the transcript to demonstrate the hostility of the hearing officer. In this case that is not even necessary; it is necessary only to read the Report. No unbiased person could have written the invectives it contains, including those set forth in Point I above. Nor could an unbiased hearing officer have "found" that General Counsel's witnesses were credible because they were segregated at the hearing and did not hear one another's testimony. Nor could an unbiased person have found that a witness' statement was believable because it was so incredible, as the Examiner did in the case of Frank Proctor, discussed in Point I above. And most certainly an unbiased person could not have adopted the nonsense about an "office brother".

Bias and prejudice in the trier of the fact has reared its ugly head, and has vitiated the whole proceeding.

For all of these reasons the Seventh Circuit erred in not refusing enforcement of the Board's report. Vindictive reports of this nature undermine the confidence of the public not only in administrative agencies, but in the courts.

V.

THE BOARD'S ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE, AND THE SEVENTH CIRCUIT ERRED IN ENFORCING IT.

A. The record does not support the conclusions that the head operators were "supervisors".

The Board's Report makes the key finding that certain employees (including the John Pounovich referred to above) were "supervisors" within the meaning of the Labor Relations Act (App. 46-53). In reaching this conclusion, the Board relied entirely upon the statement that

they had authority to "responsibly direct" other employees. It did *not* find that they had any other indicia of authority specified in the Act (Title 29 U.S.C. Sec. 152(11)).

In support of its conclusion the Board cites only the reiterated plaint of other employees that these men told them what to do (App. 48). This is not disputed—and it is not enough. These men were admittedly "lead" employees or "pushers"; this does not make them "supervisors".

On this point, the Board misapprehended both the law and the facts.

B. The record does not support the conclusion that the employer had knowledge of union activity on the part of the alleged discriminatees.

The Decision and Order take a tortuous path to prove knowledge on the part of the employer of union activity or membership on the part of the supposed discriminatees. In reaching its conclusion it relies heavily on supposed remarks made by head operators or others which are supposed to reveal knowledge of union membership on the part of the persons addressed. The descriptions of these supposed conversations are scattered throughout the Report. On the whole, their content, and the circumstances under which they are said to have occurred, brand them as obvious fabrications.

For example, an employee named Willie Larry is supposed to have "declared his support of the union in his conversations overheard by Rudy Jandak" (App. 86). Looking at the Transcript for a clue to what the Board has in mind, we find that Willie Larry testified to two occasions a week apart, on *both* of which Frank Crawford, Dave McNeal and Amos Jackson were conversing with

him; both times Jandak was five or six feet away from them. Larry claimed he declared he was for the union in a loud tone of voice. (App. 334).

This tale carries its own refutation. Is it likely that the same persons would have almost the same conversation on two occasions, on both of which Jandak (an admitted supervisor) was the same distance away? Dave McNeal and Frank Crawford were not called as witnesses to corroborate this bit of nonsense. Amos Jackson, who testified, did not mention these conversations (App. 468-472).

Corroboration is similarly lacking as to the other alleged "conversations". Thus Kubiak (the employee who was praised by the Board for his self-possession) said that Pounovich asked in the presence of C. Jones whether the witness wanted Miller's job (App. 521). C. Jones was not called to corroborate. Another Kubiak conversation was supposed to have occurred in the presence of one Pape (App. 522). Pape was not called. Willie Steele testified to a conversation with Pounovich in the presence of one Albert Holt (App. 576). Holt was not called.

These are some of the strange gaps in the "substantial" evidence. One of the most peculiar omissions involved one Jackson Sole. He is supposed to have been present at no less than three of these "conversations": two along with William Jenkins (App. 326; 4429), one with Davis (App. 389). This eager listener was called as a witness; but he was not asked about any of these supposed conversations. His testimony was carefully limited by Board counsel to his discharge and whether he wore a button; it is very brief indeed (App. 473).

In summary, the testimony as to the supposed knowledge of the employee's supposed union activity is not sup-

ported by substantial evidence. On the contrary, the evidence is inherently improbable, uncorroborated, and thoroughly unreliable.

C. The record does not support the conclusion that the layoffs of October 20, 1960 were discriminatory.

"So far as the National Labor Relations Act goes, the employer may discharge, or refuse to re-employ for any reason, just or unjust, except discrimination because of Union activities and relationships." (*American Smelting & Refining Co.* v. *N.L.R.B.*, 126 F.2d 681, 686 (1942). "The jurisdiction of the Board is a limited one and it cannot concern itself with the management of the business of employers * * *" (*Local No. 3* v. *National Labor Relations Board*, 210 F2d 325 (Cert. den. 348 U.S. 822).

The only *positive* testimony as to the layoffs of October 20, 1960, was that of Petitioner's witnesses, not disputed, that the persons involved in that lay off were employed in the paint shop, and that there were no orders for the paint shop that week, and that the layoffs were intended to be temporary (App. 634-636; 769). This testimony is substantiated by what happened later. Of the eight employees involved in the events of October 20, four were recalled within a week, when orders came in from the Government, and at the time of the hearing were employed by Petitioner (Resp. Ex. 16 and 17; App. 324; 333; 365). The other four had left voluntarily, saying in effect "You can't fire me, I quit" (Resp. Ex. 22 through 25; 3; 7; 29). They were therefore not terminated by Petitioner which regarded them as having quit, and naturally did not recall them.

Another circumstance also indicates that the paint shop was closed because of lack of orders: Four persons were

laid off on the same day who were not claimed as discriminatees (App. 86).

Thus, the only positive testimony, buttressed by the surrounding circumstances, demonstrates that the terminations of October 20 were dictated by lack of orders in the paint shop. The contrary finding by the Board is based on suspicion and surmise rather than on "substantial" evidence.

D. The record does not support the conclusion that the discharges of November 7, 1960 were discriminatory.

(1) James Harris

The Board found that one James Harris was driven to resign by the unreasonable requirements of Petitioner (App. 101-105); Petitioner contends that he refused to obey reasonable orders.

Stripping the account of this incident of the emotion with which the Board typically surrounds it, we find that the only real complaint of James Harris is that he was asked to work in a building in which there was dust, which caused an injured eye to water. No one denies that there were safety goggles available to him, and that he knew this (App. 685). Harris simply failed, or refused out of stubbornness, to put them on. A situation so easily cured can hardly be called a hardship which should be the basis for an unfair labor charge.

Further, there was no proof of hostility toward Harris on the part of any of Petitioner's agents, nor proof that he engaged in any unusual union activity. As proof of such hostility, the Board offered several supposed conversations with Miller, at which only Harris and Miller were present. Since Miller denied that the supposed events

occurred (Abst. 643), it is Miller's word against Harris', and nothing has been proved. There is also supposed to have been a conversation with Pounovich in the presence of one Prince. Prince, who testified, did not confirm this.

(2) Will Steele

The case of Will Steele (App. 105-106) is very similar to that of James Harris. Will is alleged to have been forced to stack bags by himself. The odd part about this charge is that it is very plain that he was not asked to do the work of two men, but only to work at a task at which two men were normally engaged. However, there is no testimony that any particular number of bags had to be stacked for any reason. So far as appears (and so far as can be imagined) if the bags did not get stacked, they would simply sit there with no ill effects. No one was asking Steele to work overtime, or to double his rate or to work harder than usual. Rudy Jandak testified he told Steele to just do the best he could (App. 170). "I am not asking you to do two men's jobs—just your job. Your share." *This testimony is not disputed, contradicted or denied.*

All Steele was asked to do was to work alone. Perhaps he liked company. Or, more likely, he was stubborn, sulky and uncooperative. The whole business about the bag-stacking episode is a tempest in a tea pot.

As to both Harris and Steele, the evidence is uncontradicted that they quit voluntarily. In this circumstance, the evidence that they were "driven" to do so should be very strong—which it is not.

E. The record does not support the conclusions that the lay-offs of January 11, 1961 were discriminatory.

The only positive testimony as to the layoffs of January 11 was that they were a matter of economic necessity resulting from the seasonal nature of the asphalt business (App. 639), and indeed it might almost be a matter of judicial notice that this business will fall off during the winter months. However, on this point we are not dependent on oral testimony nor on opinion: Government's Exhibit 26 shows the production of Respondent. In October, 1960, 45,703 tons; November, 29,268; December, 16,610; January, 14,551; February, 10,008. This speaks for itself; and certainly any rational observer would have expected lay-offs in January. In fact, the same Exhibit shows that the average number of employees dropped with the drop in production from 83 in October to 63 in January.

As opposed to this positive and undisputed evidence that the layoffs in January were for economic reasons, the Board offers only surmise and conjecture (App. 106-117). There is very little testimony as to any union activity or antiunion statements in the period after October 12, and there was no further necessity after that for activity on its part or for reprisals by Petitioner. The Board's Order and the Transcript alike are barren of facts on which to base the finding that the January lay-offs were the result of hostility toward the union. They further fail to demonstrate that they had the purpose or effect of discouraging membership in a labor organization.

F. The record does not support the conclusion that the discharges of February, 1961, were discriminatory.

These are the "sleepers", Dykier and Jackson, discussed by the Board at App. 117 of the Decision and Order.

It was admitted by the Board and by the General Counsel that these men were both sound asleep at their respective posts. And this was a particularly serious breach of duty because both were responsible for watching plant gates at night (App. 733; 442-444). Dykier was in charge of checking trucks leaving the plant; and yet, as both the Board and Dykier admitted, a driver would have had to tap on the window to attract his attention (App. 188; 445).

The Board offers no real defense for this conduct, except to show the sympathy we have described above for Dykier's supposed headache and family problems. It appears to regard these serious derelictions of duty as mere peccadillos, and remarks tolerantly that everyone sleeps on the night shift. (App. 121). We cannot believe that this Court will share this view.

The Board further feels that these employees should not have been discharged because they had committed the same dereliction in duty before, and it had been overlooked. Surely an employer who overlooks a fault on one occasion does not waive his right to object to it when it is repeated. In fact, one would suppose that the more often the same thing happened, the more tired of it the employer would become until finally his patience would be exhausted.

This thought is particularly interesting in the present situation because the only (slight) evidence of Petitioner's knowledge of union activity on their part was concerned with incidents in the previous October—and the discharges occurred in February. This supposed

subtle waiting for five months is quite unlike Petitioner's usual behavior as pictured by the Board.

As the Division of Unemployment Compensation of the State of Illinois aptly concluded as to Jackson: "Although the claimant had been employed for several years by the appellant-employer, the weight of the evidence established that he was discharged for sleeping on the job. The Referee concludes that this constitutes a disregard of the employer's interests, and warrants the imposition of a disqualification under the above section of law (App. 933). It made a similar determination as to Dykier (App. 932).

CONCLUSION

Very serious questions involving basic constitutional and federal statutory rights have been raised in this case. These, the Seventh Circuit did not pause to consider (Appendix A) The question presented here—whether a federal agency can achieve its own ends by the simple device of writing a vindictive, descriptive and confusing report—is concerned with the basic rights of litigants before those agencies. This question should be decided by this Court.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 13743 SEPTEMBER TERM, 1962—JANUARY SESSION, 1963

TRUMBULL ASPHALT COMPANY OF DELAWARE, *Petitioner*,
v.
NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition to Review and Set Aside an Order of the National Labor Relations Board.

March 4, 1963

Before HASTINGS, *Chief Judge*, KNOCH and SWYGERT, *Circuit Judges*.

HASTINGS, *Chief Judge*. This matter is before us on petition of Trumbull Asphalt Company (petitioner) to review and set aside an order of the National Labor Relations Board (Board). In its answer, the Board petitioned for enforcement of its order.

Petitioner processes and sells asphalt products at its Summit, Illinois plant where the events involved in this case occurred.

The Board found that during a campaign to organize petitioner's employees at its Summit plant and for several months after a Board election, petitioner violated § 8(a)(3)

and (1) of the National Labor Relations Act, 29 U.S.C.A. § 158(a)(3) and (1), by discriminating against 18 employees due to their union[1] activities, by assignments to disagreeable work, by deprivation of overtime and by layoffs and discharges. The Board further found that petitioner violated § 8(a)(1) of the Act, 29 U. S. C. A. §158 (a)(1), by threatening to visit reprisals on union supporters and promising benefits for forsaking the union, by interrogating employees as to their union sympathies, by attempting to get employees to spy on the union, by sponsoring a movement encouraging employees to withdraw from the union, and by depriving employees of benefits enjoyed prior to their choice of the union as their representative.

The Board ordered petitioner to cease and desist from engaging in the unfair labor practices found and from in any manner interfering with the exercise of rights of its employees guaranteed by Section 7 of the Act. Affirmatively, the order requires petitioner to take certain steps with reference to employment and pay of the several employees involved and other matters set out therein, all of which are consistent with its findings and conclusions.

Petitioner contends the Board's findings are not supported by substantial evidence on the record considered as a whole. Our examination of the voluminous record in this case leads us to the conclusion that there is ample evidence to support the Board's findings. We deem it unnecessary to set out in this opinion the factors in support of the Board's decision. See *NLRB* v. *Twin Table & Furniture Co.*, 8 Cir. 308 F. 2d 686 (1962). A proper analysis of the evidence is contained in the trial examiner's report which adopted by the Board. The Board's decision and order appear at 136 NLRB No. 134.

Petitioner attacks the form of the Board's decision, contending that it is "impossible to determine on what evidence the Board's conclusions rest." We find no merit in this contention.

[1] The union involved is Warehouse & Mail Order Employees Union, Local 743, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the union.

The Board adopted the intermediate report of the trial examiner, and it is of this report that petitioner complains. The trial examiner's report is a detailed presentation and analysis of the evidence, containing inferences which the trier of fact is entitled to make. The trial examiner was not "compelled to annotate to each finding the evidence supporting it." *U. S.* v. *Pierce Auto Lines*, 327 U. S. 515, 529 (1946). The report is written in a rather dramatic style, but this does not make it susceptible to a charge that petitioner was denied due process of law.

The form of the Board's opinion did not deprive petitioner of its right to know the charges against it or of its right of appeal to this court.

We have carefully considered the remaining contentions of petitioner and find them without merit. These include a charge of bias and prejudice on the part of the trial examiner, the trial examiner's ruling on evidence and his failure to grant petitioner's motion for a bill of particulars.

Having determined that the Board's findings are supported by substantial evidence on the record considered as a whole, the petition to review and set aside the Board's order will be denied. The petition for enforcement is granted and the Board's order will be enforced in full.

ENFORCEMENT ORDERED.

APPENDIX B

Stamped: U.S.C.A.—7th Circuit
Received in Clerk's Office
Mar 13 1963
Kenneth J. Carrick
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

TRUMBULL ASPHALT COMPANY OF DELAWARE,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 13743

DECREE.

Before: HASTINGS, *Chief Judge*, KNOCH and SWYGERT *Circuit Judges.*

This Cause came on to be heard upon the petition of Trumbull Asphalt Company of Delaware, to review and set aside a certain order of the National Labor Relations Board issued against petitioner, on April 25, 1962, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective Counsel on February 1, 1963, and has considered the briefs and the transcript filed in this cause. On March 4, 1963, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor

Relations Board in said proceeding be enforced, and that Trumbull Asphalt Company of Delaware, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ John S. Hastings
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Luther M. Swygert
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Win G. Knoch
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

Stamped: U.S.C.A.—7th Circuit

Filed
Mar 26 1963

Kenneth J. Carrick
Clerk